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CITATIONS

762321—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 304

THE BROWN INSTRUMENT COMPANY, PETITIONER

v.

SAM B. WARNER, REGISTER OF COPYRIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 42) is reported at 68 U. S. P. Q. 41. The opinion of the Court of Appeals (R. 172–173) is reported at 161 F. 2d 910.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1947 (R. 174). The petition for a writ of certiorari was filed on August 27, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether blank charts which (1) are designed and intended for use in and as essential working parts of certain specific recording machines, (2) are not intended for the purpose of giving information or explanation, and (3) have printed on their face, circular, arcuate, and straight lines so spaced as to permit their use in the recording machines for purposes of measuring variables such as temperature, pressure, etc., are works for which copyright may be secured under the copyright laws.

CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED

Article 1, Section 8, Clause 8 of the Constitution and the relevant portions of the copyright laws and the regulations of the Copyright Office are set forth in Appendix A, *infra,* pp. 14–17.

STATEMENT

Petitioner is a Pennsylvania corporation which manufactures recording machines and parts and replacement parts for such machines (R. 43). It also produces numerous charts designed as working mechanical elements and essential parts of those machines (*Id.*). The charts contain printed matter such as appears on blank graph paper, and are ruled with spaced circular, arcuate, and straight lines in accordance with the mechanical characteristics of the particular machines in

which they are intended to be used (*Id.*).[1] Though these rulings on the charts are based on mathematical or scientific calculations, and it may be possible for one skilled in the art to deduce with more or less accuracy the data or specifications upon which they are based, the object of the charts is for use as parts of petitioner's recording machines and not for the purpose of giving information, and the real information they provide is that inscribed by the recording arms or styli of the machines when operated by purchasers of the machines (R. 43–44).[2] Petitioner's

[1] Two typical charts of petitioner are illustrated in appendix B, *infra*,, pp. 18–19.

[2] The recording machines manufactured by petitioner are designed to make possible the exact determination of variables like temperature, pressure, vacuum, etc., at any given time in the period of the machines' operation. Thus, a temperature-recording machine consists of a thermometer including a temperature-responsive means, a pivoted marking arm or stylus adapted to swing about its pivot in response to the temperature variations, a calibrated circular-chart element upon which the marking arm traces a line as the temperature varies, and a clock which turns the chart at a rate dependent on the period which one desires to measure on the individual chart. The chart designed for use in that machine contains concentric arcs or circles, whose spacing is such that the ink line traced by the stylus will indicate the true temperature; and with arc lines which extend from the center of the chart to the circumference and are marked to indicate variations in time. By reason of the printed arcuate time lines, the chart, in effect, serves as the face of the clock and a moving element of the clock structure; by reason of its spaced concentric temperature circles, it serves as the moving element of the temperature-responsive means.

charts are constructed solely for use in its machines and are not interchangeable with charts of competitors; it would be an accident if any of petitioner's charts should fit and accurately record on a competitor's machine (R. 59).

In 1928, after it had been selling its charts for many years without claiming copyright protection, petitioner decided to apply for their registration (R. 47–48, 52). Although the Register of Copyrights then expressed his doubts as to their copyrightability, he did register the charts, upon petitioner's insistence, leaving to the courts the adjudication of the validity of the copyrights (R. 12–16). This practice was continued until 1944, when, confronted with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Taylor Instrument Companies* v. *Fawley-Brost Co.*, 139 F. 2d 98 (holding printed charts such as petitioner's not proper subject matter for copyright) and this Court's denial of certiorari in that case, 321 U. S. 785, the Copyright Office reversed its policy and rejected petitioner's further applications for registration of its charts (R. 17–20).

Petitioner thereupon instituted this suit in the District Court for the District of Columbia, requesting a declaratory judgment that petitioner's charts "are 'drawings * * * of a scientific or technical character' within the purview of classification (i) of Section 5 of the Copyright Laws

constituting writings under Section 4 of said laws and are copyrightable;" and a mandatory injunction compelling respondent to issue certificates of registration for such charts (R. 4).[3] Issue was joined by the filing of an answer to the complaint (R. 5–12), an amendment thereto (R. 29–30, 32), a counterclaim requesting a declaration of the uncopyrightability of all petitioner's charts with respect to which registration had been rejected (R. 30–32), and a reply to the counterclaim (R. 35–36). After a trial before the court without a jury (R. 46–123), the court, on February 15, 1946, announced its opinion (R. 42) and entered its findings of fact, conclusions of law, and order dismissing petitioner's complaint with prejudice and sustaining respondent's counterclaim (R. 43–45). It concluded that petitioner had "failed to establish that its charts are 'writings of an author' or 'drawings' within the meaning of the Constitution and the copyright statute, or that said charts convey or are capable of conveying the thought of an author" (R. 43), branding petitioner's contention that the charts convey information as merely "a pretext" (R. 42). Perceiving no substantial difference between the case in hand and the *Taylor Instrument Companies* case, 139 F. 2d 98, certiorari denied, 321 U. S. 785

[3] The suit was initiated against Richard C. De Wolf, Acting Register of Copyrights, but respondent, who had succeeded Mr. De Wolf, was substituted as defendant on April 30, 1945 (R. 27–28).

(R. 42), it held that petitioner was not entitled to copyright as to any of its charts (R. 44, 45).

An appeal was thereupon taken to the United States Court of Appeals for the District of Columbia, which affirmed the order of the district court (R. 172–173, 174). It held that the "evidence supports the findings and the findings require the conclusion" reached by the district court, that the *Taylor Instrument Companies, supra,* was in point and correct, and that *Baker* v. *Selden,* 101 U. S. 99, was controlling (R. 173). Adverting to the policy considerations supporting its decision, it said: "Since the machines which cooperate with the charts in suit are useless without them, to copyright the charts would in effect continue * * * [petitioner's] monopoly of its machines beyond the time authorized by the patent law" (*Id.*).

ARGUMENT

This case was decided in accordance with established principles and does not call for review by this Court.

1. Petitioner's repeated suggestions to the contrary notwithstanding (Pet. 5–6, 7, 12, 13–15), there is nothing new or startling in the rule announced below. The court held merely that petitioner's printed charts, since they are objects of use and not of information or explanation, are not subject to copyright, under the applicable

statutes.[4] That holding is clearly in accord with the rule announced by this Court in *Baker* v. *Selden,* 101 U. S. 99, as early as 1880, excluding such material from copyright privileges, a ruling that has never since been disturbed. In the *Baker* case, Selden had obtained the copyright of a book exhibiting and explaining a peculiar system of bookkeeping. The book contained, as illustrations of Selden's method, printed ledger sheets, appropriately ruled with lines and columns and provided with headings. The Court held that Selden's copyright "did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated" in his book (101 U. S., at 107). The object of his book, said the Court, was "explanation"; the object of the art described therein was "use." "The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent" (101 U. S., at 105).[5]

[4] Petitioner, in its endeavors to find something drastic and revolutionary in the rule of the decision, persists in ignoring its dichotomy and in erroneously characterizing it as excluding from copyright articles intended for practical use in connection with a machine, without consideration at all of whether they are designed for information or explanation (Pet. 5, 13–14). The court below applies a conjunctive rule: articles which are designed for use *and* not for information or explanation are not subject to copyright.

[5] The following statement in the Court's opinion (101 U. S., at 103) is particularly noteworthy in view of peti-

Selden's ledger sheet is obviously similar to petitioner's printed chart. Both are blank articles intended to be written upon, and both have ruled lines and headings to permit or facilitate interpretation of what is to be subsequently written upon the blanks. In both, the object is "use" and not "explanation."

When the very question presented here was put to this Court as recently as 1944, it declined to consider it. *Taylor Instrument Companies* v. *Fawley-Brost Co.*, 139 F. 2d 98 (C. C. A. 7), certiorari denied, 321 U. S. 785. The Taylor charts there involved were the very same type of charts as are here in issue. Holding such charts not copyrightable, the Circuit Court of Appeals for the Seventh Circuit said (139 F. 2d, at 100):

> Notwithstanding plaintiff's rather feeble argument to the contrary, the chart neither teaches nor explains the use of the art. It is an essential element of the machine; it is the art itself. It is our judgment that plaintiff's charts are not the proper subject of

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tioner's characterization of its charts, here in issue, as "engineering pictures" based on mathematical computations (Pet. 1–2):

"The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, *or to the diagrams which he employs to explain them*, so as to prevent an engineer from using them whenever occasion requires." [Emphasis supplied.]

copyright and that the recognition of an exclusive property right therein would be, in the words of the Supreme Court in the Baker case, "a surprise and a fraud upon the public."[6]

Petitioner is not aided by its reliance (Pet. 4–5, 11) on the following half-sentences of the district court's findings: "The charts in suit were based upon mathematical or scientific calculations * * *" (R. 43); and "It is perhaps possible for one skilled in the art to deduce with more or less accuracy the data or specifications upon which the charts are based * * *" (R. 44). Petitioner omits to point to the coordinate clauses which both lower courts deemed not only of equal, but of greater importance: "* * * but their object is for use as parts of the plaintiff's machines and not for the purpose of giving information" (R. 43); and "* * * but the real information that is to be given is that which

[6] See, in accord: (1) *Amberg File and Index Co.* v. *Shea Smith & Co.*, 82 Fed. 314 (C. C. A. 7)—a letter file index is not a proper subject for copyright, since it was "not made for explanation, but for use," notwithstanding the fact that the spaces between the letters on the tab sheets were adjusted in accord with the average requirements ascertained by the plaintiff in an extensive study of city directories; and (2) *Davis* v. *Comitti*, 52 L. T. Rep. N. S., 539 (Chanc. Div.)—a chart on the face of a barometer, consisting of a calibrated scale, is not copyrightable, for the chart had no intelligible significance independent of the barometer and could have meaning only as a part of the instrument, read in connection with its column of mercury and its movable hands or indices.

would be given by curves made by the stylus of * * * [petitioner's] recording instruments when put in operation by the purchaser of such instruments" (R. 44). The uselessness of petitioner's charts except as integral parts of its recording machines is plain when one appreciates its failure, in the face of testimony by one long experienced in the repair and servicing of its machines that he had never purchased a chart for use apart from the machines (R. 118), to adduce any evidence at all that its charts had ever been used or sold because of information they might impart independently of the recording instruments. Clearly, the charts were intended for use in the recording devices and not that they might be read, as a book, for the complex mathematical computations upon which they may have been based.

Nor is petitioner correct in its reading of the statutes and regulations of the Copyright Office (Pet. 3, 13). To urge that petitioner's charts are "Drawings * * * of a scientific or technical character" (Copyright Act, Section 5 (i), *infra*, p. 14) is to beg the question. The lower courts found that they are not. Certainly they are not so clearly embraced within the definition of that term afforded by the regulations of the Copyright Office[7] as to require reversal of the lower

[7] That definition reads as follows: "This term includes diagrams or models illustrating scientific or technical works, architects' plans, designs for engineering work, relief maps, etc." (Section 201.4 (b) (9).)

courts' concurrent findings. To the contrary, the regulations seem clearly to exclude such charts, even on petitioner's questionable assumption that they are embodiments of mathematical computations:

> Expressions of mechanical principles taking the form of the slide rule, revolving disk and like devices * * * sometimes submitted for copyright registration as "books" are not registerable as such. * * * (Section 201.4 (b) (1), *infra*, p. 15).[8]

2. Not only the authority of prior decisions but compelling considerations of policy dictated the decision below. In several of the patents whose numbers appear on the name-plates of petitioner's recording machines, the charts here in issue are specifically included as one of the operative elements covered by the claims defining the patented machines (R. 124–142; particularly, R. 137, 141–142). These patents on the recording machines endure at the most for only

[8] The short answer to petitioner's purported fears that the rule of the decision below precludes the registration for copyright of newspapers, motion picture films, and stereopticon views (Pet. 13–14) is that the Copyright Act specifically provides for their registration (Section 5 (b): "Periodicals, including newspapers;" Section 5 (j): "Photographs;" Section 5 (k): "Prints and pictorial illustrations;" Section 5 (m): "Motion pictures other than photoplays.") (17 U. S. C. 4–5). Petitioner is, of course, unable to claim a similar Congressional recognition of the copyrightability of its printed charts.

17 years (35 U. S. C. 40). The potential life of statutory copyrights on the printed chart elements of the machines, if granted, would, on the other hand, amount to 56 years (17 U. S. C. 23). Since the charts are essential elements of the recording machines, petitioner, by securing registration of copyrights on the charts, would consequently be in a position to restrain the actual use of the patented machines for many years after the covering patents had expired. As Justice Chitty pointed out in *Davis* v. *Comitti,* 52 L. T. Rep., N. S., 539, 540 (Chanc. Div.):

> * * * It would be strange if the inventor, who, by means of a patent could obtain a monopoly for his invention for a term of fourteen years, was enabled to obtain a distinct right of copyright for a period of at least forty-two years for the letterpress on the dial, or some other essential part of his invention, and thus, after the expiration of the period for which his patent was granted, be in a position to restrain the serviceable user of some letterpress which formed an essential part of his invention. * * *

The court below, in condemning such an evasion as an obvious misuse of the patent system, was quite properly solicitous of the public interest (Cf. *Mercoid Corporation* v. *Mid-Continent Investment Co.,* 320 U. S. 661).

CONCLUSION

The decision below is in accord with established principles. Petitioner does not allege any conflict of decisions. The petition should be denied.

Respectfully submitted.

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OCTOBER 1947.

APPENDIX A

1. *Constitution of the United States,* Article 1, Section 8, Clause 8:

> The Congress shall have Power * * *
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

2. *Copyright Act,* March 4, 1909, c. 320 (35 Stat. 1075), 17 U. S. C. 1 *et seq.*:

> *Section 4* (35 Stat. 1076): That the works for which copyright may be secured under this Act shall include all the writings of an author.
>
> *Section 5* (35 Stat. 1076): That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> * * * * *
>
> (i) Drawings or plastic works of a scientific or technical character;
>
> * * * * *
>
> *Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act * * *.

3. *Regulations of the Copyright Office* (37 C. F. R. 201.1 *et seq.,* as amended, 37 C. F. R., Cum. Supp. 1943, 201.4):

> *Section 201.4 (b) (1) Books.* This term includes "composite and cyclopaedic works, directories,, gazetteers, and other compila-

tions," and, generally, all printed literary works (except dramatic compositions), whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, card, or single page. The term "book" as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables; interest, cost, and wage tables, etc.; single poems, and the words of a song when printed and published without music; descriptions of motion pictures or spectacles; catalogues; circulars or folders containing information in the form of reading matter, and literary contributions to periodicals or newspapers.

The term "book" cannot be applied to blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum books, blank diaries or journals, bank deposit and check books; forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness.

Expressions of mechanical principles taking the form of the slide rule, revolving disk and like devices or other "instruments or tools of any kind" (201.4 (b) (7)) sometimes submitted for copyright registration as "books" are not registerable as such. This is also true with respect to words, figures, symbols, etc., essential to the operation of such devices and instructions concerning their use if physically incorporated in such devices: *Provided,* That such instructions if not so incorporated and

other material of itself copyrightable appearing on such instrument or tool but not essential to the operation thereof, will be registered in the Copyright Office if published with a copyright notice which does not purport to copyright the instrument or tool as such. (See section 29 of the Copyright Act.)

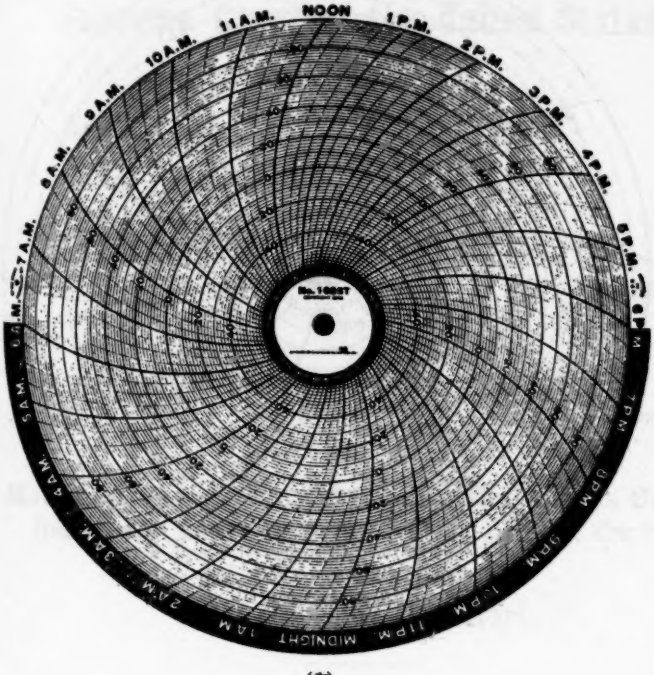
Section 201.4 (b) (7). *Works of art and models or designs for works of art.* This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration.

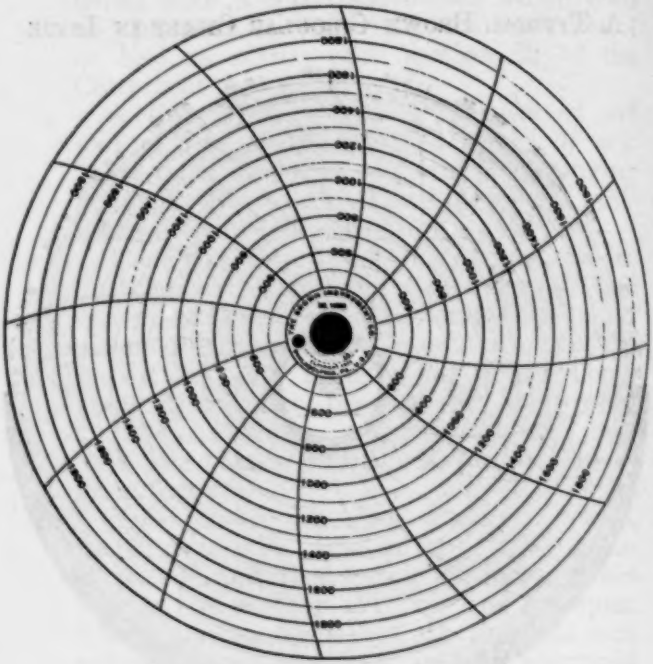
APPENDIX B

A Typical Brown Circular Chart in Issue



Another Typical Brown Circular Chart in Issue

(Other examples in Defendant's Exhibit Book 4)



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